

## Analyzing Conservation Efforts During the Listing Process: Legal Considerations

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1. Statutory language relevant to agency consideration of conservation efforts that reduce or remove threats to the species.
  - a. The Secretary shall determine whether any species is Threatened or Endangered because of one or more of the following five factors:
    1. Present or threatened destruction, modification, or curtailment of habitat or range.
    2. Overutilization for commercial, recreational, scientific, or educational purposes.
    3. Disease or predation.
    4. Inadequacy of existing regulatory mechanisms.
    5. Other natural or manmade factors affecting its continued existence.
  - b. "The Secretary shall make determinations required by subsection (a)(1)... after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."
    1. Provision has been interpreted by the Services to apply also to efforts being made by other federal agencies, tribal governments, or private entities.
      - a. Application to entities other than states and foreign nations upheld by *American Fisheries Society v. Verity*, 1989 WL 644255 (E.D. Cal. 1989), *Oregon Natural Resources Council v. Hodel*, 6 F. Supp. 2d 1139 (D. Or. 1998).
      - b. But application to entities other than states and foreign nations found to be contrary to law by *Friends of the Wild Swan v. FWS*, 945 F. Supp. 1388 (D. Or. 1996).

- c. All aspects of the listing decision, including analysis of conservation efforts, must be based "solely on . . . the best scientific and commercial data available."
2. Analysis of conservation efforts that have been implemented and have demonstrated effectiveness in addressing the targeted threat.
- a. Courts have upheld consideration of existing conservation efforts where the administrative record showed that the effort had reduced or removed a threat to the species. See *American Fisheries Society v. Verity*, 1989 WL 644255 (E.D. Cal. 1989); *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158 (N.D. Cal. 2000).
3. Analysis of conservation efforts that have not yet been implemented or have not yet demonstrated effectiveness in addressing the targeted threat.
- a. Basic standards
    - 1. Determination of whether a species meets the definition of Threatened or Endangered involves an assessment of the likelihood that future events with anticipated effects will occur and/or the likelihood that current events with observed effects will continue to occur.
      - a. Because it is not possible to "know" what will occur in the future, this assessment must gauge the likelihood that the event will occur or continue to occur and, if the event occurs, the likelihood of the predicted effect.
      - b. This assessment should take into consideration events that have both positive and negative effects on the species.
    - 2. A decision not to list may not be based on a determination that one or more conservation efforts are likely to improve the status of the species in the future.
      - a. The ESA requires the Services to list a species when, due to one or more of the types of threats listed under section 4(a)(1), they find that the species meets the definition of Threatened or Endangered at the time of the listing decision.
      - b. The agencies may not rely on conservation efforts to defer an assessment of the species' status. Thus the agency must find that the threat has been reduced as of the time of the

listing decision, not that the threat will be reduced in the future when the effort is implemented.

1. "Fatal flaw" occurred when agency did not find that species was not likely to become endangered in the foreseeable future but rather stated that species was not likely to become endangered between the time of the listing decision and implementation of conservation efforts. *Oregon Natural Resources Council v. Hodel*, 6 F. Supp. 2d 1139 (D. Or. 1998) (not reasonable that two years is limit of foreseeable future and agency cannot defer making a decision while waiting for some possible future event).
- 3.. Courts have ruled that the Services cannot rely upon speculative future measures with uncertain effects in determining the status of a species.
  - a. The Services agree that commitments to implement conservation efforts that do not provide a high level of certainty of both implementation and effectiveness cannot be found to have reduced the threat at the time that the listing decision must be made. See *Friends of the Wild Swan v. FWS*, 945 F. Supp. 1388 (D. Or. 1996) (criticism of agency finding of "ongoing management changes that are expected to benefit some populations") (emphasis added); *Defenders of Wildlife v. Norton*, No. 99-02072 (D.D.C. 2001) (noting agency statement regarding future land management activities that the agency "expect[s] to be compatible with the continued existence of bears at current levels."). See also *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.D.C. 1996) ("record makes reference to possible future actions"); *Biodiversity Legal Found. V. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996) (same).
  - b. Some courts have found that "future" efforts are necessarily speculative and cannot be relied upon in assessing the status of a species. See *Oregon Natural Resources Council v. Hodel*, 6 F. Supp. 2d 1139 (D. Or. 1998) (focusing of statutory language that agency should take into account any efforts "being made," court rules that agency may only consider efforts that are currently operational and may not rely on plans for future actions); *Save Our Springs Legal Defense Fund v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997).

- c. But some courts have upheld "future" or "voluntary" efforts where the administrative record showed that the effort had improved the status of the species. See *Southwest Center for Biological v. Norton*, No. 97-0593 (D.D.C. 2001); *Defenders of Wildlife v. Babbitt*, No. 97-2330 (S.D. Cal. 1999) rev'd sub. nom., *Defenders of Wildlife v. Norton*, 258 F. 3d 1136 (9<sup>th</sup> Cir. 2001) (overturned on other grounds). See also *Cook Inlet Beluga Whale v. Daley*, No. 00-1017 (D.D.C. 2001).
- d. Courts have split over whether the Services can rely on nonregulatory, voluntary efforts such as incentive-based programs. While one court found that voluntary efforts are "necessarily speculative," another court found that voluntary efforts are also concrete proposals, although "excessive reliance on primarily voluntary plans may be arbitrary and capricious." Compare *Oregon Natural Resources Council v. Hodel*, 6 F. Supp. 2d 1139 (D. Or. 1998) with *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158 (N.D. Cal. 2000).

b. Policy for the Evaluation of Conservation Efforts When Making Listing Decisions (PECE). 68 Federal Register 15,100 (March 28, 2003)

- 1. PECE provides guidance on how efforts that have not yet been implemented and/or have not yet demonstrated effectiveness in reducing a threat will be analyzed during the listing process.
  - a. PECE is not a "how to" on putting together conservation agreements, although entities interested in developing an effective conservation agreement may look to PECE to see how efforts within the agreement will be evaluated later by the Services.
- 2. Applies to "formalized conservation efforts": conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document.
- 3. Agency must find that a conservation effort is sufficiently certain to be implemented and sufficiently certain to be effective before assessing the extent to which the conservation effort has reduced or removed a threat to the species.

- a. The term "sufficiently certain" was used to indicate that the agency should find a high level of certainty before relying on the effort in assessing the status of the species.
    - 1. Administrative record should reflect how the entity has provided a high level of certainty of implementation and effectiveness to avoid past concerns of reliance on speculative measures with uncertain effects on the species.
  - b. Policy sets out a number of criteria by which to analyze certainty of implementation and certainty of effectiveness.
    - 1. Criteria are indicators by which to assess certainty. Additional indicators specific to the situation may lead to a finding of a higher level of certainty or a lesser level of certainty.
    - 2. Criteria for determining whether there is adequate certainty are not exclusive.
4. Each conservation effort contained in an agreement or plan should be assessed separately for certainty of implementation and/or certainty of effectiveness.
- a. Even if some indicators are common to a number of efforts (for example, funding for several efforts will come from the same source), determination of the certainty of implementation and effectiveness is a fact-specific inquiry that must take into account all relevant information. It is unlikely that all indicators of certainty will be identical for a number of efforts.
  - b. If an effort has not yet been implemented, it must be evaluated for certainty of both implementation and effectiveness. If it has been implemented but has not yet demonstrated effectiveness in addressing the threat, it must be evaluated for certainty of effectiveness.
5. Defensibility of reliance on a conservation effort will depend upon the strength of the certainty analysis. Merely indicating that each criterion has been met is not enough.
6. Following a determination that a particular conservation effort is sufficiently certain to be implemented and sufficiently certain to be effective, that effort (or group of efforts) should be assessed to

determine the extent to which the effort has reduced the particular threat to the species.

4. Providing advice on conservation efforts prior to the listing decision process.
  - a. Service staff can provide information on the biological status of the species, information on threats to the species, and information on actions that in the biologist's professional judgment may reduce or remove threats to the species.
  - b. Service staff should not provide information or engage in discussions in a manner that gives the appearance that they are agreeing not to list the species in return for the entity agreeing to commit to particular conservation efforts.
  - c. Service staff may provide an assessment of whether any particular conservation effort appears to provide sufficient certainty of implementation or effectiveness, but should not give the appearance that they or the Service are guaranteeing that sufficient certainty will be found at the time of the listing decision.
    1. Following the time that an assessment is given on a particular conservation effort, new information may become available that is relevant to determining the certainty of implementation or effectiveness. For example, completion of initial steps on an effort would indicate greater certainty that the effort actually will be implemented. On the other hand, new information received after the assessment may indicate that the entity is less likely to be able to actually implement the effort in the time stated, that the threat is more severe than understood at the time, or that a threat is more widespread than understood at the time. The final determination must be based on all relevant information available to the agency at the time of the decision.
  - d. Service staff should provide explanations of the ESA substantive and procedural listing standards, as needed. This may include an explanation and documentation of what factors may not be considered during the listing process.
    1. Service staff involved with providing advice on conservation agreements who are also involved in the listing decision-making process should ensure, and document, that all listing standards are strictly adhered to and that any information obtained during discussion about an agreement that is not relevant to the listing process (such as concerns about the economic impact of a listing) is not considered.



2. Courts have linked communications with state officials regarding conservation efforts to inappropriate political influence in the ESA listing process. See *Save Our Springs Legal Defense Fund v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997).
- e. Defensible conservation agreements will provide specific details indicating who will do exactly what, exactly when.
- f. Entities interested in developing conservation efforts should be encouraged to begin the process as early as needed to avoid last-minute submissions that have proven difficult to defend in litigation.
  1. Agreements presented to the agency for consideration after a public comment period has closed create conflict between the responsibility to allow meaningful public comment on significant aspects of the rule-making process and ESA statutory deadlines. See *Save Our Springs Legal Defense Fund v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997).
  2. Courts are skeptical of "last minute" agreements, which they have interpreted as arrangements to ward off listing, not good-faith conservation measures to help protect the species. See *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158 (N.D. Cal. 2000); *Oregon Natural Resources Council v. Hodel*, 6 F. Supp. 2d 1139 (D. Or. 1998); *Save Our Springs Legal Defense Fund v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997).
  3. Early completion of conservation agreements allows parties to begin implementation of efforts. Completion of initial actions increases the likelihood that the entity will actually implement the effort, thus increasing the level of certainty of implementation.
5. Other relevant laws
  - a. Federal Advisory Committee Act (FACA)
    1. Requires balanced composition of groups that qualify as "advisory committees." Regulates administration of such groups, including public notice of group composition and public notice of meetings.
    2. It is a violation of law to seek consensus advice or recommendations in a manner inconsistent with FACA restrictions. FACA may be implicated during meetings between the Services and outside entities to discuss listing of a species or development of a conservation agreement.

3. Groups consisting solely of federal, state, or tribal government officials are exempt.

4. For guidance on when FACA restrictions apply, see GSA regulations at 66 Federal Register 37,728 (July 19, 2001).

b. Freedom of Information Act (FOIA)

1. Governs the release of federal records upon request by a member of the public.

2. Exemptions allow federal government to withhold certain types of documents.

3. Proper documentation of FOIA releases will ensure consistency among various requesters and avoid waiver of the ability to withhold documents.

4. Proper documentation of FOIA releases will avoid later conflict on what to include in the administrative record if there is a lawsuit.

c. Administrative Procedure Act (APA)

1. Sets rule-making standards, including public notice and the opportunity to comment.

a. The public should have the opportunity to comment during the public comment period on conservation efforts that play a significant role in the agency's assessment of the legal status of a species.

2. Sets standards for judicial review: was the agency arbitrary and capricious in relying on particular conservation efforts?

6. The administrative record

a. Importance of a thorough, complete administrative record.

1. Document the evolution of the listing process for the benefit of the agency for use in later listing decisions, consultation, and recovery planning for the species; Congressional inquiries; or listings of related species or species facing similar threats.

2. Defend your hard work if the agency gets sued.



b. What do you include?

1. All relevant documents that were before the decision-makers and were considered during the process that reflect the evolution of the agency decision, both procedurally and substantively.
  - a. The administrative record should adequately and accurately document that appropriate ESA listing procedures were followed and all ESA listing standards were met.
2. Include both "positive" and "negative" documents.
  - a. Be professional in all communications: what you write in an e-mail today could show up in an administration record tomorrow.

c. Who are the decision-makers?

1. Biologists who worked on the listing process.
2. Anyone in the approval chain.
3. Attorneys who reviewed and commented on the listing decision.

d. Handling materials that are privileged.

1. Documents that may be withholdable from parties in litigation because they are privileged are still part of the administrative record.
2. Be sure that withholdings in litigation are consistent with prior FOIA releases. A prior release under FOIA will likely waive the right to withhold a document.

e. Administrative record issues specific to analysis of conservation efforts.

1. Administrative record should document how all conservation efforts were analyzed – both efforts analyzed under PECE and efforts already implemented.
  - a. See *Defenders of Wildlife v. Norton*, No. 99-02072 (D.D.C. 2001) (court noting that determination that relied on conservation efforts in a forest management plan did not indicate whether the plan was being implemented, whether the plan required government action, whether the plan merely authorized future government action, and failed to

identify the particular regulatory actions actually being undertaken).

2. Defensible listing decisions involving conservation efforts will have an administrative record that documents thoroughly the agency's justification for each finding that a conservation effort will be implemented and will be effective.

7. Role of the Solicitor's Office

- a. Providing general advice on the listing analysis and application of PECE.
- b. Providing specific advice on particular listings.
- c. Providing specific advice on development or analysis of particular conservation agreements.